



## DEPARTMENT OF VETERANS AFFAIRS

8320-01

### Summary of a Precedent Opinion of the General Counsel

**AGENCY:** Department of Veterans Affairs.

**ACTION:** Notice.

**SUMMARY:** The Department of Veterans Affairs (VA) is publishing a summary of a legal interpretation issued by the Office of the General Counsel (OGC) involving crediting certain veterans for their payment of the statutory funding fee. This interpretation is considered precedential by VA and will be followed by VA officials and employees in matters involving the same legal issues. This summary is published to provide the public with notice of VA's interpretations regarding the legal matters at issue.

**FOR FURTHER INFORMATION CONTACT:** Ms. Suzanne Hill, Law Librarian, Department of Veterans Affairs, Office of the General Counsel, 810 Vermont Avenue, NW, Washington, DC 20420, (202) 461-7624.

**SUPPLEMENTARY INFORMATION:** A VA regulation at 38 Code of Federal Regulation 2.6(e)(8) delegates to the VA General Counsel, the power to designate an opinion as precedential, and 38 CFR 14.507(b) specifies that precedential opinions are binding on VA officials and employees in subsequent matters involving the legal issue decided in the precedent opinion. The interpretation of the General Counsel on legal matters contained in such opinions is conclusive as to all VA officials and employees not only in the matter at issue but also in subsequent matters unless there has been a material change in a controlling statute or regulation or a superseding written legal opinion of the General Counsel or a judicial decision. 38 CFR 14.507(b). VA publishes summaries of such opinions in order to provide the public with notice of those interpretations of the General Counsel that must be followed in future matters. The full text of such opinions, with

personal identifiers deleted, may be obtained by contacting the VA official named above or by accessing the opinions on the internet at: <http://www.va.gov/ogc/precedentopinions.asp>.

## **VAOPGCPREC 2–2019**

### *Questions Presented:*

1. Does VA have legal authority to issue a refund of a funding fee collected under 38 United States Code 3729 when the requirements for waiver of the fee under section 3729(c) are met?
2. If yes, to whom and under what circumstances?
3. Is a refund determination subject to the Veterans Appeals Improvement and Modernization Act of 2017 (AMA)?

### *Held:*

1. Yes. If VA determines that veterans impermissibly incurred funding fees due to overt error, systems limitations, or process limitations, VA should promptly credit such veterans for the fees they incurred. Additionally, VA must refund a funding fee if a later-in-time award of disability compensation is effective as of a date that is on or before the date the funding fee was collected.
2. We believe a claim for remittance of a funding fee that was improperly assessed or that may now be refunded due to an intervening retroactive award of service-connected benefits is similar to the types of claims that the U.S. Court of Appeals for Veterans Claims has found not to be claims for benefits. Since a claim for a refund is not a claim for benefits, VA should promulgate rules clarifying VA's policy and procedures for processing claims for refunds. VA should continue to issue refunds whenever VA determines on its own, or if a veteran provides documentation, that a refund is due.
3. The three-lane review scheme of the AMA applies to claims for "benefits"; VA is not

required to make all three AMA review options available with respect to determinations not involving benefit claims. VA could choose to make higher-level review processes for supplemental claims or make similar processes available for decisions concerning requests for refund of the funding fee.

*Effective Date:* June 25, 2019.

Richard J. Hipolit,  
Principal Deputy General Counsel

SIGNING AUTHORITY: The Secretary of Veterans Affairs, or designee, approved this document and authorized the undersigned to sign and submit the document to the Office of the Federal Register for publication electronically as an official document of the Department of Veterans Affairs. Pamela J. Powers, the Chief of Staff of Veterans Affairs, approved this document on November 13, 2019, for publication.

**Jeffrey M. Martin,**  
*Assistant Director,  
Office of Regulation Policy & Management,  
Office of the Secretary,  
Department of Veterans Affairs.*

[FR Doc. 2019-25113 Filed: 11/19/2019 8:45 am; Publication Date: 11/20/2019]